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IN THE

Supreme Court of the United States

October Term, 1964.

No. 371.

ALVIN H. FRANKEL, Guardian of the Estate of CAROL TILLMAN, a Minor,

Petitioner,

v.

EDWARD HOGE VICK, M.D., and CLARENCE C. BRISCOE, M.D.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The District Court denied petitioner's motion for new trial in an unreported opinion which appears at pp. 337a and 338a of the Appendix to the Petition. The Opinion of the Court of Appeals for the Third Circuit is reported at 331 F. 2d 309.

JURISDICTION.

It is not disputed that there is jurisdiction under Title 28, U. S. C. Section 1254(1).

QUESTION PRESENTED.

Where suit is brought by a guardian for alleged injuries to his ward, does the district judge presiding at the trial have the right to direct the removal of the unruly minor ward from the corridor outside the courtroom door in the interest of preserving order and decorum in the courtroom?

COUNTER-STATEMENT OF THE CASE.

Petitioner, plaintiff below, brought suit against Respondents, an obstetrician and a pediatrician, alleging malpractice in the delivery and post-natal treatment of Petitioner's ward, Carol Tillman. At the time of trial, Carol Tillman was five years old and was mentally and physically retarded. She cannot understand a vocal command (18b) and has a mental age of between one and two years (43b).

This Petition relates to the order of the Trial Judge in granting the motion of Respondents, that the child be excluded from the courtroom and the corridor immediately outside the courtroom except during those times when her presence was required for purposes of the trial (51a, 52a, 234a, 250a).

In the interests of accuracy and completeness, this restatement of the case is necessary. As will fully appear from the Opinion of the District Court (337a, 338a Appendix to Petition), the minor ward was making noises in the courtroom which were both vocal and demonstrative. She would bang and kick the small cart or stroller in which she frequently sat. There was implicit recognition of the distraction she caused in the action of counsel for her guardian

who had her removed to the corridor outside the courtroom on many occasions during the first four days of the trial when her actions became so extreme as to cause distraction and "disturb the decorum of the court".

Even in the corridor outside the courtroom, her cries and demonstrations penetrated the courtroom to such an extent that at the noon recess on the fifth day the Trial Judge, *sua sponte*, granted motions of the defendants which had been made at earlier stages and directed the removal of the child to the far end of the corridor. So that this Court will have some idea of the physical facts of the courthouse in question, the trial in this case took place in Courtroom No. 1. The child was directed to be kept at a place in the same corridor and on the same floor which would be approximately outside Courtroom No. 6. The facts are fairly and accurately outlined in the opinion of the District Judge, reprinted at pages 337a and 338a in the Appendix to the Petition. Further references supporting these facts can be found in the Appendices at pages 51a, 52a, 234a, 235a, 236a, 250a, 337a, 338a, 74b, 75b and 76b.

In a nutshell the Trial Court ordered the removal of the child from a place where her sounds and disturbances were distracting to the work of the Court and only after it was clearly apparent that these disturbances were distracting.

REASONS WHY PETITION SHOULD BE DENIED.

I. Petitioner's Constitutional Rights Were Not Violated by the Order of the Trial Court Removing Petitioner's Ward From Her Place in the Corridor Outside the Courtroom Where Her Actions and Noises Were Distracting to the Work of the Court to a Room at the Other End of the Corridor Where Such Disturbances Could Not Be Heard in the Courtroom and Were Not Distracting to the Court and Jury.

While not so stated, Petitioner's contention is that his Constitutional rights have been violated because of the Trial Court's Order removing Carol Tillman from a place in the corridor where her noises were distracting to the work of the Court and jury to a room at the other end of the corridor where the distraction would not and did not exist. He argues that this Order denied him the right to a trial by jury as guaranteed by the Seventh Amendment and a denial of due process as guaranteed under the Fifth Amendment. We submit that there was no such deprivation and that Petitioner is here attempting to raise a Constitutional issue where none is present. The Constitutional right as claimed does not exist.

The law is clear that a party has a right to be present in person or by counsel at all stages of the proceedings. *Shields v. United States*, 273 U. S. 583, 47 S. Ct. 478, 71 L. Ed. 787 (1927); *Filippon v. Albion View Slate Company*, 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 853 (1919); *Arrington v. Robertson*, 114 F. 2d 821 (C. A. 5, 1940). In this case Petitioner was represented by able counsel who was present throughout. This cannot be doubted. These cases do not stand for the proposition advanced by Petitioner that a party, in contrast to counsel, has a right to be present at all stages and under any and all circumstances. This is particularly true in a case such as this where the party who by reason of age and mental incapacity is totally unable to participate in the trial or to even understand what is going on.

In the usual case, the Constitutional question arises from the right of confrontation in criminal matters and the right of a party to be present for the purpose of consulting with counsel so that he may assist counsel in his defense. That these considerations have no application in this case need not be labored. However, even in a criminal case where the rights of a defendant are accorded greater protection and a party's competency and capacity to understand the nature of the proceedings are presumed, the right of a party to be present at all stages of the proceedings is not absolute. In a word, a party need be present only when there exists some reason for his presence and not otherwise. The leading case dealing with the question is *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934). In this oft-quoted opinion, Mr. Justice Cardozo sets forth the nature and extent of the requirement of physical presence in a criminal case, at pages 105-106, as follows:

> "We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person *whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.*" (Emphasis ours)

As can be seen, the right to be present at the trial must bear some reasonable relationship to the ability and opportunity to assist in the presentation of one's case. If this be the extent of the right in a criminal case, Petitioner cannot claim a greater right in this, a civil case: *Shields v. United States*, *supra*.

In this case the reason for and necessity of the child's presence was non-existent. She could not even interpret her surroundings let alone participate in the trial or consult with counsel. The Order was entered at a time when the jury had a full and complete understanding of her condition from actual observation during the days of trial before she was voluntarily placed in the corridor by Petitioner's counsel.

Contrariwise, there was every reason to remove her from her place in the corridor on the fifth day of trial when her noise and disturbances from without the courtroom reached a crescendo, so to speak. The Court had the full power and indeed the duty to maintain order and insist that the trial proceed without such disturbances. *In re Greene*, 160 F. 2d 517 (C.A. 3, 1947).

It cannot be claimed that any evidentiary purpose could be served by Carol Tillman's presence in the courtroom or corridor after the entry of the order complained of. Petitioner was satisfied to permit the child to remain in the corridor outside the courtroom until the Court entered the Order. Immediately following, he for the first time, moved the Court to permit Carol Tillman to come in the courtroom and to remain there for the balance of the trial. He advanced no reason for so moving. At no time thereafter did Petitioner request the Court to permit him to demonstrate the child to the jury or request a witness to so demonstrate, which request would have been granted (338a). The fact is that the jury had a full and complete understanding of Carol Tillman's condition during those times that she was in the courtroom prior to the entry of the Order on the fifth day.

A determination as to whether Petitioner's Constitutional rights have been violated must be made in the background of the facts as they appear. Such a determination cannot be made in a vacuum. The factual backdrop here clearly indicates that no Constitutional right of Petitioner was abridged and that in truth no Constitutional question exists. The only possible Constitutional deprivation that could have resulted under these facts would have been the failure of the Court to act when the child's disturbances and noises reached the point of distraction.

The Constitutional guarantees under the Fifth and Seventh Amendments were preserved to both Petitioner and Respondents by the timely action of the Trial Court leaving no Constitutional question for determination by this Court

II. The Order of the Court Below in Refusing to Award a New Trial and in Finding That the Trial Judge Did Not Err in Ordering Petitioner's Ward From Her Place in the Corridor to Another Room in the Courthouse in Order to Abate the Noise Which She Was Creating Does Not Conflict With the Decisions of This Court or Other Appellate Courts But Rather Is Consistent Therewith.

Petitioner claims that the rulings below conflict with the opinions of this Court and other courts. This is not so. Again Petitioner has refused to interpret the cases in light of the facts here present. The issue in *Shields v. U. S.*, 273 U. S. 583, 47 S. Ct. 478, 71 L. Ed. 787 (1927); *Fillippon v. Albion Vein Slate Company*, 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 853 (1919); and *Arrington v. Robertson*, 114 F. 2d 821 (C. A. 3, 1940) concerned itself with the *absence of counsel* at a crucial and meaningful point of the trial. To apply these cases to the situation here presented distorts their holdings. The cases cited relating to sequestration have no application whatever. These cases do not involve a disorderly party and assume competency and the ability of the party to participate in the proceedings. The cases cited by Petitioner simply do not stand for the proposition asserted. In none of them was the Court presented with a situation where action was required in order to abate a disturbance distracting to the work of the Court. Many of them merely stand for the proposition that the Trial Judge did not abuse his discretion in failing to exclude from the courtroom a seriously injured party whose mere presence was claimed to be prejudicial. This is far different than the claim here made.

The Order of the Court which Petitioner characterized as banishment but which in reality was not, does not conflict with the rulings of any case including those cited by Petitioner in the text or margin of the Petition. On the

contrary, it meets the test of Constitutionality and is consistent with the rulings of this Court and other courts where this or similar questions have been presented. *Gorman v. Sabo*, 210 Md. 155, 122 A. 2d 475 (1956); *Casson v. Horton*, 226 Md. 575, 174 A. 2d 581 (1961); *Thorpe v. Thorpe*, 75 Cal. App. 2d 605, 171 Pa. 2d 126 (1946); *Walden v. Jones*, 289 Ky. 395, 158 S. W. 2d 609 (1942); *Walker v. United States*, 322 F. 2d 434 (C. A. D. C. 1963).

The rule is that presence of a party is required to the extent that a fair and just hearing would be thwarted by his absence and to that extent only. *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934). Petitioner contends that the rule goes further and required Carol Tillman's presence at all times despite the fact that her presence in the courtroom and corridor outside the courtroom disrupted the trial. He cited no case which supports this theory for indeed there is none. The cases Petitioner cites, to the extent applicable at all, support the proposition advanced by Respondents.

CONCLUSION.

Upon the foregoing considerations, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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